



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

APR 25 2005

VIA HAND DELIVERY

Carol Laham, Esq.
Wiley Rein & Fielding, LLP
1776 K Street, N.W.
Washington, D.C. 20006

Re: MUR 5365
Club for Growth, Inc.
Club for Growth, Inc. PAC and Pat Toomey, in his
official capacity as Treasurer

Dear Ms. Laham:

Based on a complaint filed with the Federal Election Commission on May 13, 2003, the Commission, on October 19, 2004 and March 16, 2005, found that there was reason to believe that Club for Growth, Inc., Club for Growth, Inc. PAC and Pat Toomey, in his official capacity as Treasurer, your clients, violated various provisions of the Federal Election Campaign Act, as amended, ("the Act") and instituted an investigation of this matter.

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that Club for Growth, Inc. violated 2 U.S.C. §§ 433, 434, 441a(f) and 441b(a), and that Club for Growth, Inc. PAC and Pat Toomey, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(f) and 441b(a). In the alternative, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that Club for Growth, Inc., Club for Growth, Inc. PAC and Pat Toomey, in his official capacity as Treasurer, violated 2 U.S.C. §§ 441a(f), 441b and 11 C.F.R. §§ 102.5, 104.10, and 106.6, or violated 2 U.S.C. § 441b and 11 C.F.R. § 114.2(a).

The Commission may or may not approve the General Counsel's recommendation. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and

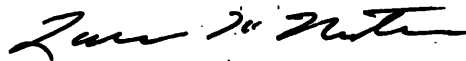
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Carol Laham, Esq.
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any brief that you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

Should you have any questions, please contact Julie McConnell, the attorney assigned to this matter, at (202) 694-1582.

Sincerely,



Lawrence H. Norton
General Counsel

Enclosure
Brief

27044172557

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2 In the Matter of)

Club for Growth, Inc.)

Club for Growth, Inc. PAC)

Pat Toomey, in his official capacity as)
Treasurer)

MUR 5365

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4 **GENERAL COUNSEL'S BRIEF**

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7 **I. INTRODUCTION**

8 This matter was generated by a complaint filed with the Federal Election Commission by
9 the Democratic Senatorial Campaign Committee, alleging that Club for Growth, Inc., a political
10 organization established in 1999, violated the Federal Election Campaign Act of 1971, as
11 amended ("the Act"). The complaint alleged that, *inter alia*, Club for Growth, Inc. failed to
12 register as a political committee and report its contributions and expenditures to the Commission
13 despite having received more than \$1,000 in contributions.

14 On October 19, 2004, the Commission made reason to believe findings as to Club for
15 Growth, Inc. and its separate segregated fund, Club for Growth, Inc. PAC. Specifically, the
16 Commission found reason to believe that:

17 • Club for Growth, Inc. violated 2 U.S.C. §§ 433 and 434 by failing to register as a
18 political committee with the Commission and report its contributions and
19 expenditures;

20 • Club for Growth, Inc. and Club for Growth, Inc. PAC violated 2 U.S.C. § 441a(f)
21 by knowingly accepting contributions in excess of \$5,000 and 2 U.S.C. § 441b(a)
22 by knowingly accepting corporate contributions;

23 • Club for Growth, Inc. violated 2 U.S.C. §§ 441a(f), 441b(a) and 11 C.F.R. §§
24 102.5, 104.10, 106.1 and 106.6 by failing to attribute and report expenses between
25 multiple federal candidates, by failing to allocate and report shared administrative
26 and fundraising activities and by using prohibited funds to pay for the federal
27 share of those expenses, which may have resulted in prohibited and excessive
28 contributions;

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1 Club for Growth, Inc. PAC violated 2 U.S.C. §§ 441a(f), 441b and 11 C.F.R. §§
2 102.5, 104.10, 106.1 and 106.6 by failing to attribute and report expenses between
3 multiple federal candidates and by failing to allocate and report shared
4 administrative and fundraising activities, which may have resulted in prohibited
5 and excessive contributions; and

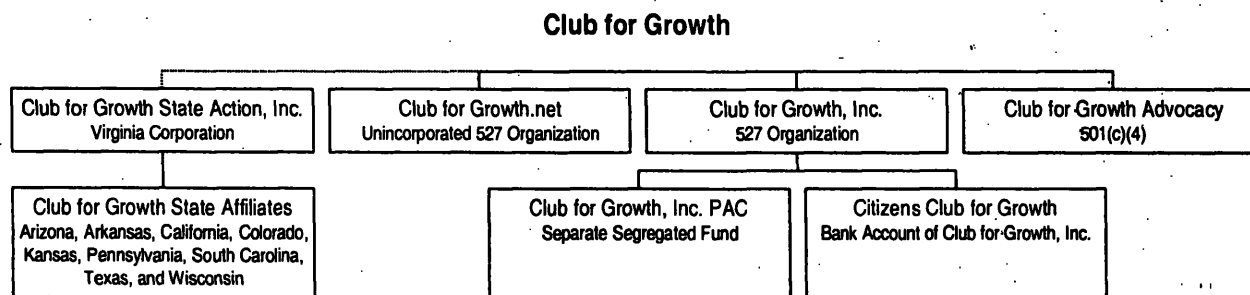
6 Club for Growth, Inc. violated 2 U.S.C. § 441b and 11 C.F.R. § 114.2(a) by
7 making prohibited corporate expenditures.

8 The Commission added Pat Toomey, in his official capacity as Treasurer, to the reason to believe
9 findings made as to Club for Growth, Inc. PAC on March 16, 2005.

10 Based on the following factual and legal analysis, the General Counsel is prepared to
11 recommend that the Commission find probable cause to believe that Club for Growth, Inc.
12 violated 2 U.S.C. §§ 433, 434 by failing to register with the Commission as a political committee
13 and report its contributions and expenditures, and that Club for Growth, Inc., Club for Growth,
14 Inc. PAC and Pat Toomey, in his official capacity as Treasurer of Club for Growth, Inc. PAC,
15 violated 2 U.S.C. §§ 441a(f) and 441b(a) by knowingly accepting contributions in excess of
16 \$5,000 and 2 U.S.C. § 441b(a) by knowingly accepting corporate contributions. The General
17 Counsel is prepared to recommend, in the alternative, that the Commission find probable cause
18 to believe that Club for Growth, Inc., Club for Growth, Inc. PAC and Pat Toomey, in his official
19 capacity as Treasurer of Club for Growth, Inc. PAC, violated 2 U.S.C. §§ 441a(f), 441b(a) and
20 11 C.F.R. §§ 102.5, 104.10, and 106.6 by failing to allocate and report shared administrative and
21 fundraising activities, which resulted in prohibited and excessive contributions, and by failing to
22 treat as contributions funds received for the purpose of influencing a federal election. As an
23 additional alternative, the General Counsel is prepared to recommend that Club for Growth, Inc.
24 violated 2 U.S.C. § 441b and 11 C.F.R. § 114.2(a) by making prohibited corporate expenditures
25 for express advocacy communications.

II. SUMMARY OF FACTS

Four entities exist under the immediate Club for Growth umbrella: Club for Growth, Inc. ("CFG"), an incorporated 527 organization; Club for Growth, Inc. PAC ("CFG PAC"), its designated separate segregated fund ("SSF"); Club for Growth Advocacy, an affiliated 501(c)(4) organization; and Club for Growth.net ("CFG.net"), an unincorporated 527 organization described as "connected" to the other Club for Growth entities in its Internal Revenue Service ("IRS") filings.¹ Club for Growth also has a "committee" called Citizens Club for Growth, which it describes as a "checking account" of CFG that was used to run advertisements during the 2004 election cycle.² Finally, Club for Growth has state affiliates in Arizona, Arkansas, California, Colorado, Kansas, Pennsylvania, South Carolina, Texas, and Wisconsin, which are organized and administered by Club for Growth State Action, Inc., a national organization created by CFG.³ The following chart depicts the various Club for Growth entities.



¹ See CFG.net, Form 8871: Political Organization Notice of 527 Status (Sept. 16, 2004). This organization spent approximately \$4.16 million on electioneering communications during the 2004 election cycle. See 2004 Electioneering Communications by Organization, at http://www.fec.gov/finance/disclosure/ec_name01.shtml (last visited Apr. 1, 2005).

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³ See Club for Growth State Action, at <http://www.cfgsa.org/about.htm> (last visited Mar. 31, 2005); see also Keating Dep. at 95-97; Westlaw Corporate Records Search.

1 A. **Club for Growth, Inc.,**

2 1. Structure and Organization

3 The activities and purpose of CFG are central to the instant matter. CFG, a Virginia
4 corporation established in May 1999 and registered with the IRS as a 527 organization,
5 represents itself as a membership organization.⁴ In its initial registration with the IRS, CFG
6 initially averred that it was "primarily dedicated to helping elect pro-growth, pro-freedom
7 candidates through political contributions and issue advocacy campaigns."⁵ Indeed, virtually
8 every CFG membership solicitation between 2000 and 2004 confirms that the mission of the
9 organization is to elect pro-growth Republican candidates to Congress who are advocates of
10 limited government and lower taxes.⁶

⁴ CFG asserts that it is a membership organization and that CFG PAC is its separate segregated fund. *See* CFG PAC, Statement of Organization at 2 (Jan. 21, 2005); CFG, Form 990: 2003 Exempt Organization Tax Return at Statement 1; CFG, Form 8871: Political Organization Notice of 527 Status (amended Jan. 31, 2005); *see also* *infra* note 6.

⁵ *See* CFG, Form 8871: Political Organization Notice of 527 Status (Aug. 4, 2000); *see also* CFG, Form 8871: Political Organization Notice of 527 Status (amended Jan. 31, 2005).

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1 CFG has approximately 31,000 supporters that it considers "members."⁷ Between 2000
2 and mid-2002, CFG required that its members pay annual dues averaging \$100.⁸ CFG
3 subsequently amended its bylaws, however, and now offers free membership to all supporters
4 who pledge to consider donating at least \$50 to candidates for Congress recommended by CFG
5 PAC.⁹ David Keating, Executive Director of CFG, testified that individuals need not give any
6 sort of donation to CFG and may become members by simply accepting membership and
7 providing their name and contact information.¹⁰ Members do not have the right to elect
8 representatives on CFG's Board of Directors or Founders Committee or approve its annual
9 budget or activities.¹¹ CFG members currently may vote on an annual policy question selected
10 by the Founders Committee but, to date, this has occurred only once, when members voted to
11 make tort reform a policy priority during the 2004 election.¹²

12 Although it currently does not require dues, CFG accepts "two-year voluntary
13 membership contribution[s]" and other donations from its supporters to fund its candidate

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1 research and advertising campaigns.¹³ During the 2004 election cycle, CFG received \$7,490,544
2 in donations from supporters, including \$1,781,000 received in 2003 from 55 donors who made
3 annual contributions to the organization exceeding \$5,000.¹⁴ CFG's 2004 receipts include the
4 following large contributions made between October 1 and November 2, 2004.¹⁵

Contributor	Amount	Date
John Childs	\$100,000	10/08/2004
G.J. Jensen	\$1,038,000	10/22/2004, 10/30/2004
Aubrey McClendon	\$500,000	10/01/2004, 10/21/2004
Bob Perry	\$400,000	10/04/2004, 10/12/2004
T. Boone Pickens	\$100,000	11/02/2004
Jackson Stephens	\$100,000	10/19/2004
Michael Stevens	\$140,000	10/28/2004
Tom Ward	\$250,000	10/21/2004

5 During the 2002 cycle, CFG received \$4,692,644 in direct public support, including \$1,518,500
6 in donations received in 2001 from 53 donors and \$1,744,500 received in 2002 from 32 donors
7 who made annual contributions to the organization exceeding \$5,000.¹⁶ In the 2000 cycle, CFG
8 received \$714,276 in contributions.¹⁷

¹³ See How We Will Make a Difference, at <http://www.clubforgrowth.org/how.php> (last visited Apr. 6, 2005).

¹⁴ See CFG, Form 990: 2003 Exempt Organization Tax Return at Schedule B, 1-17.

¹⁵ See 527 Committee Activity, at <http://www.opensecrets.org/527s/527cmtes.asp> (Mar. 21, 2005) (incorporating most recent IRS data); see also Center for Public Integrity, at <http://www.publicintegrity.org/527search.aspx?act=com&orgid=96> (Jan. 31, 2005) ("Center for Public Integrity Committee Summary"); CFG, Forms 8872: Reports of Contributions and Expenditures for 2004; CFG, Form 990: 2003 Exempt Organization Tax Return at 1, ln. 1(a).

¹⁶ See CFG, Forms 990: 2001-02 Exempt Organization Tax Returns at 1, ln. 1(a); Center for Public Integrity Committee Summary.

¹⁷ See Center for Public Integrity Committee Summary.

2. Candidate Research and Advertising

To further its "overriding mission [] to help good candidates win," CFG operates in two primary ways.¹⁸ First, CFG interviews various Congressional candidates in each election cycle and selects candidates for endorsement by its PAC.¹⁹ During the candidate research process, CFG staff studies published material about each candidate's district, examines whether the congressional district leans Republican or Democrat, analyzes the legislative history and strength of the incumbent and the candidate's free-market record and positions, and reviews publicly available information about each candidate's financial resources.²⁰ CFG then sends a consultant to each candidate's district to research the candidate's record as a public official or activist and observe the candidate, and, apparently, to discuss campaign strategy, fundraising, and the timing of advertising buys with the candidate's staff.²¹ Using the information obtained through its research, CFG evaluates the following factors in determining whether to endorse a candidate:

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¹⁹ Although CFG funds the interview process and pays the consultants retained to research the relevant candidates and races, CFG PAC pays for communications to CFG's "members" that contain candidate recommendations and solicitations for earmarked contributions.

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1. Position on free market issues.
2. Commitment to these issues and power in championing them.
3. Prospects of winning.
4. Potential impact of their election of future legislation.
5. Whether the Club can really help put them over the top.²²

Based on these factors, as well as on the analysis of a third-party political consultant retained by CFG and the results of its candidate forums, CFG selects candidates for endorsement.²³

Second, CFG funds advertisements and other public communications to benefit endorsed candidates and increase their chances of winning. Specifically, CFG uses its advertisements to create a "larger margin of error" in each of its races and to effectively increase the amount of funds available to its candidates:

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5 In crafting its advertisements, CFG funds research and polling to ascertain the most effective
6 message and determine the size, timing and placement of its advertising buys.²⁵ Indeed, CFG has
7 tightly coordinated its polling with its advertising buys and has decided to go on or off the air or
8 spend additional money on advertising based on its poll results.²⁶ In addition, CFG's decisions
9 about whether and when to place advertising buys have been influenced by the amount of money
10 available to its candidates and their opponents.²⁷

11 During the 2000 election cycle, CFG spent a total of \$850,000 on advertising to benefit
12 candidates endorsed by CFG PAC.²⁸ For example, in Florida's 8th Congressional District, CFG
13 spent \$240,691 on television and radio advertisements to benefit Ric Keller during the
14 Republican primary between Keller and Bill Sublette, plus an additional \$92,118 on television

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1 advertisements targeting the "pro-tax" positions of Keller's general election opponent, Linda
2 Chapin.²⁹ CFG also spent \$39,631 for an "aggressive" phone bank operation that completed
3 approximately 40,000 calls in the four days before the runoff primary.³⁰ Similarly, in Arizona's
4 1st Congressional District, CFG spent \$49,266 on advertisements and \$20,792 on get-out-the-
5 vote ("GOTV") phone messages to benefit Jeff Flake during the Republican primary.

6 In the 2002 election cycle, CFG spent approximately \$2.5 million on advertising, with the
7 vast majority of its advertising buys in 2002.³¹ Of this total, CFG spent approximately \$560,000
8 on advertising campaigns directed toward specific House candidates in California, Iowa, Indiana,
9 Maryland, New Jersey, New York, Tennessee and Utah and \$600,000 on its "Daschle
10 Democrats" advertising campaign attacking Democratic Senate candidates in Texas, Arkansas,
11 South Dakota, New Hampshire, Colorado and Missouri.³² An advertisement broadcast in the
12 Arkansas Senate race, for example, compared Senate candidate Mark Pryor to "bobblehead"
13 dolls of Senators Hillary Clinton, Edward Kennedy and Tom Daschle and asserted, "[T]he
14 Daschle Democrats say yes to Mark Pryor for U.S. Senate, and that's bad for Arkansas," while
15 the on-screen text read, "Mark Pryor... Bad for Arkansas" and "Say 'NO' to the Daschle

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³¹ See CFG, Forms 990: 2001-2002 Exempt Organization Tax Returns at 2, ln. 43(a).

³² See Club for Growth Press Release, <http://www.clubforgrowth.com/advertising/daschle-2-press.php> (Oct. 23, 2002); see also KEN GOLDSTEIN & JOEL RIVLIN, POLITICAL ADVERTISING IN THE 2002 ELECTIONS 39-43 (2004) (<http://www.polisci.wisc.edu/tvadvertising>); *Club for Growth Boosts Spending in Close House Races*, CONG. DAILY, Nov. 1, 2002.

1 Democrats.”³³ A virtually identical advertisement broadcast in the Texas Senate race similarly
2 stated, “[T]he Daschle Democrats say yes to Ron Kirk for U.S. Senate, and that’s bad for
3 Texas.”³⁴ See Appendix A.

4 Finally, CFG spent approximately \$7 million on advertising during the 2004 cycle.³⁵
5 Many of its advertisements during this cycle were directed at the 2004 Presidential candidates.
6 For example, CFG spent approximately \$100,000 on an advertisement comparing Howard Dean
7 to failed Presidential candidates George McGovern, Walter Mondale and Michael Dukakis, and
8 featuring a timeline of the former candidates with “Rejected” stamped under each candidate’s
9 picture.³⁶ CFG also spent \$500,000 on advertisements comparing President George Bush to
10 former President Ronald Reagan, criticizing Bush’s Democratic opponent, Senator John Kerry,
11 for statements made about Communism during the Vietnam War, and concluding, “John Kerry:
12 Wrong Then, Wrong Now.”³⁷ CFG funded several other television advertisements that criticized
13 Senator Kerry or praised President Bush, as well as a print advertising campaign blaming trial

³³ See BCRA And Interest Group Advertising In The 2002 Elections, at <http://www.polisci.wisc.edu/tvadvertising> (last visited Apr. 4, 2005) (includes Pryor Bobblehead Storyboard).

³⁴ See “Daschle Democrats,” available at <http://www.clubforgrowth.org/pastproject.php> (last visited Apr. 11, 2005).

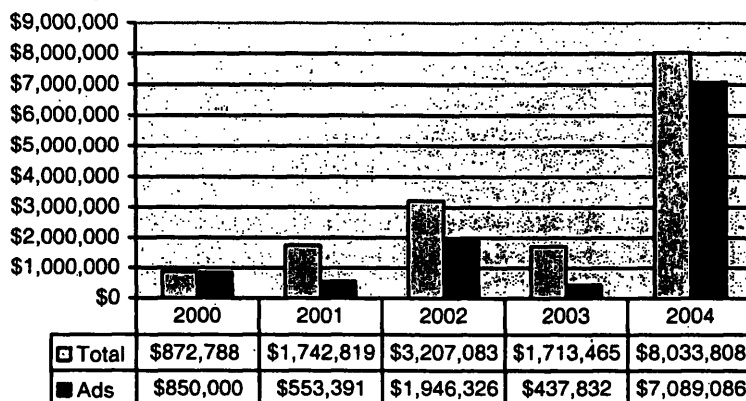
³⁵ See Center for Public Integrity Committee Summary (listing disbursements of \$4,581,779 to Red Sea LLC and its polling subsidiary, Basswood Research, and \$2,830,553 to Thompson Communications, Inc.); CFG, Form 990: 2003 Exempt Organization Tax Return at 2, In. 43(a); CFG, Forms 8872: Reports of Contributions and Expenditures for 2004.

³⁶ See “Tax Redux,” at <http://www.clubforgrowth.org/video/tax-redux.ram> (last visited Apr. 5, 2005). The “Tax Redux” advertisements began running on December 4, 2003 on Des Moines, Iowa and Manchester, New Hampshire broadcast stations and on cable news channels in both states, and CFG budgeted \$100,000 for the advertising campaign. See Club for Growth Press Release, <http://www.clubforgrowth.org/advertising/dean-release.php> (Dec. 3, 2003); CFG, Form 8872: December 2003 Report of Contributions and Expenditures at 13 (amended Oct. 23, 2004) (disbursement of \$58,570 paid to Red Sea LLC on December 12, 2003 for an “issue advocacy campaign”).

³⁷ Club for Growth Press Release, at <http://www.clubforgrowth.org/news/040621.php> (Jun. 21, 2004); CFG, Form 8872: Report of Contributions and Expenditures for June 2004 at 14, 16-17 (amended Jan. 5, 2005) (listing \$668,076 in disbursements to Red Sea LLC and Thompson Communications, Inc. for television production costs and advertising buys).

lawyers and their "best friends in Congress: John Kerry and John Edwards" for the flu shot shortage.³⁸

The following chart summarizes CFG's annual advertising disbursements compared to its total disbursements for each year since 2000.



The vast majority of CFG's advertisements reference a clearly identified federal candidate in the context of an election.

CFG has endorsed a limited number of state candidates, but its state and local disbursements comprise a small amount of its total spending. In 2000, CFG spent \$173,449.57, approximately 20 percent of its total disbursements, on billboard and television advertisements to benefit Bret Schundler, a candidate for New Jersey governor.³⁹ During the 2002 cycle, CFG did limited fundraising for candidates in the California and South Carolina gubernatorial races and contributed \$250,000 – approximately 5 percent of its total disbursements – to Council for

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1 Responsible Government to fund advertisements in the Arizona gubernatorial race.⁴⁰ CFG made
2 no disbursements in connection with state or local races during the 2004 cycle.⁴¹

3 **B. Club for Growth, Inc. PAC**

4 CFG PAC is a multicandidate committee registered as the separate segregated fund of
5 CFG. CFG PAC endorses candidates based on candidate research conducted by CFG and solicits
6 earmarked contributions from CFG's "members" for recommended candidates.⁴² After receiving
7 checks and credit card contributions earmarked for candidates, CFG PAC bundles the
8 contributions and sends them to each campaign with the checks of others who contributed to the
9 same candidate.⁴³ CFG PAC also gives direct contributions to candidates in highly competitive
10 races.⁴⁴ In 2002, CFG PAC was the number-one non-party source of campaign funds for
11 Republican candidates, outranking the first- and second-ranked corporate PACs combined.⁴⁵

12 CFG PAC funded no advertisements during the 2000 or 2002 election cycles.⁴⁶ During
13 the 2004 cycle, and in response to the Supreme Court's decision upholding the electioneering
14 communications provisions of the Bipartisan Campaign Reform Act ("BCRA"), CFG PAC
15 began soliciting and spending hard dollars for advertisements aired within 30 days of a primary

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CFG PAC pays for the communications containing candidate endorsements and solicitations for earmarked contributions and makes advance payments to CFG for staff time spent drafting and preparing them.

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1 or 60 days of a general election.⁴⁷ CFG PAC funded several advertisements attacking Senator
2 Kerry, including at least one advertisement that was initially aired by CFG, as well as various
3 advertisements expressly advocating the election or defeat of various House and Senate
4 candidates.⁴⁸ In 2004, CFG PAC reported independent expenditures of \$1,501,253, including
5 payments for mail costs and television advertisements made to benefit specific federal
6 candidates.⁴⁹

7 As a separate segregated fund, CFG PAC "does not use any money... for overhead,
8 administration, campaign law compliance or fundraising costs for the Club."⁵⁰ Nor does CFG
9 PAC pay for its own fundraising expenses, as CFG actively solicits funds for CFG PAC and
10 allows supporters to renew their "memberships" by contributing to CFG PAC.⁵¹ Indeed, CFG
11 PAC's only expenses include the costs associated with drafting and mailing communications
12 containing candidate endorsements and solicitations for earmarked contributions, postage for
13 bundled contributions, and production and distribution costs for express advocacy
14 communications and advertisements broadcast within the electioneering communications
15 period.⁵²

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49 *See generally* CFG PAC, Reports of Receipts and Disbursements, at Schedule E (2004).

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1 **III. LEGAL ANALYSIS**

2 **A. Club for Growth is a Political Committee Because It Exceeded the \$1,000**
3 **Statutory Threshold for Expenditures and Contributions and Its Major, if**
4 **Not Sole, Purpose is Federal Campaign Activity**

5 CFG is a political committee under the Act, and as such, is subject to the Act's
6 contribution limitations, source prohibitions, and reporting requirements. *See* 2 U.S.C.
7 §§ 431(4)(A), 433, 434, 441a, and 441b. The Act defines a "political committee" as any
8 committee, club, association, or other group of persons that receives "contributions" or makes
9 "expenditures" for the purpose of influencing a federal election which aggregate in excess of
10 \$1,000 during a calendar year. *See* 2 U.S.C. § 431(4)(A). For the purpose of triggering political
11 committee status, the Act defines the terms "contributions" and "expenditures" as including
12 "anything of value made by any person for the purpose of influencing any election for Federal
13 office." *See* 2 U.S.C. §§ 431(8)(A)(i), (9)(A)(i). Under the most stringent interpretation of the
14 term "expenditure," only communications that expressly advocate the election or defeat of a
15 clearly identified federal candidate are "for the purpose of influencing" a federal election.⁵³ *See*
16 *Buckley v. Valeo*, 424 U.S. 1, 79-80 (1976).

⁵³ *McConnell v. FEC*, 124 S.Ct. 619 (2003), found that certain activities in addition to communications containing express advocacy influence federal elections. For example, the Court concluded that public communications that promote, support, attack, or oppose a clearly identified Federal candidate "undoubtedly have a dramatic effect on Federal elections," *id.* at 675, and that this test satisfies constitutional vagueness concerns. *See id.* at 675, n.64. While the Bipartisan Campaign Reform Act ("BCRA") principally applies this test to officeholders and party committees, it also appears in BCRA as a limit on the Commission's authority to exempt through regulation a communication that otherwise meets the requirements of an electioneering communication. The Court also found "that many of the targeted tax-exempt organizations engage in sophisticated and effective electioneering activities for the purpose of influencing federal elections, including waging broadcast campaigns promoting or attacking particular candidates and conducting large-scale voter registration and GOTV drives." *Id.* at 678, n.68. In this matter, because there is an ample record of CFG advertisements containing express advocacy and solicitations that make clear that the funds will be used by CFG to help elect or defeat a clearly identified candidate, a probable cause finding in this matter does not require that the Commission determine whether, in light of *McConnell*, the term "expenditure" should be read more broadly.

CFG exceeded the statutory threshold for political committee status in at least two ways. First, CFG funded numerous communications to the general public expressly advocating the election or defeat of a clearly identified federal candidate. Second, CFG received contributions exceeding \$1,000 in response to fundraising solicitations stating that funds received would be used to elect specific pro-growth Republicans to Congress, as well as in response to solicitations that specifically requested money to fund advertising campaigns against particular candidates. As a result of these expenditures and contributions, CFG, which possesses the major purpose of federal campaign activity, triggered political committee status as of 2000. From that point on, CFG had a continuing duty to report to the Commission and comply with the contribution limits and source limitations of the Act, which it has failed to do.

1. Club for Growth Exceeded the \$1,000 Statutory Threshold for Expenditures

Between 2000 and 2004, CFG made expenditures totaling approximately \$1.28 million on communications to the general public expressly advocating the election or defeat of a clearly identified federal candidate. Under the Commission's regulations, express advocacy exists where a communication uses phrases such as "vote for the President," "re-elect your Congressman," or "Smith for Congress," or uses campaign slogans or words that in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers, or advertisements that say, "Nixon's the One," "Carter '76," "Reagan/Bush," or "Mondale!" See 11 C.F.R. § 100.22(a); see also *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) ("MCFL") ("[The publication] provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature.").

1 Express advocacy also exists where communications contain an "electoral portion" that is
2 "unmistakable, unambiguous, and suggestive of only one meaning" and about which "reasonable
3 minds could not differ as to whether it encourages actions to elect or defeat" a candidate when
4 taken as a whole and with limited reference to external events, such as the proximity to the
5 election. *See* 11 C.F.R. § 100.22(b).

6 Since 2000, CFG has financed numerous advertisements and GOTV phone messages that
7 qualify as express advocacy under both standards. *See* Appendix A. Each communication listed
8 in Appendix A refers to the candidates as candidates, speaks to viewers or listeners as voters, and
9 explicitly urges the election or defeat of clearly identified candidates. For example, one of the
10 phone bank messages distributed to benefit Jeff Flake, a candidate in the 2000 Republican
11 Primary in Arizona's First Congressional District, stated, "Jeff will serve your first district, I
12 believe in Arizona, with honesty, integrity, and dedication. Please vote on Tuesday and keep Jeff
13 Flake in mind when you do."⁵⁴ Similarly, a phone bank message distributed to benefit Ric
14 Keller, a primary and general election candidate in Florida's 8th Congressional district in 2000,
15 asserted, "Ric Keller is a true Reagan Republican who would make a great conservative
16 congressman in Washington fighting alongside me for our values. Please, remember to vote in
17 Tuesday's primary."⁵⁵ Television and radio advertisements aired by CFG to benefit Ric Keller
18 stated, "This is a mission for Orange County Republican runoff voters. You must find a
19 conservative Republican for Congress who will battle liberal Democrat Linda Chapin. Ric
20 Keller is the true fiscal conservative in the runoff... Remember, only a tax cutter like Ric Keller

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1 can compete with liberal Linda Chapin.⁵⁶ Because these examples contain an explicit directive
2 to vote for the identified federal candidates, they constitute express advocacy under § 100.22(a).
3 These same communications also satisfy § 100.22(b) because they contain an electoral portion
4 that is unmistakable, unambiguous, and suggestive of only one meaning and about which
5 reasonable minds could not differ as to whether they encourage actions to elect or defeat the
6 named candidate or encourage some other kind of action. Many other examples satisfying both
7 § 100.22(a) and (b) are listed in Appendix A.⁵⁷

8 CFG's expenditures for express advocacy communications to the general public, which
9 totaled approximately \$1.28 million between 2000 and 2004, greatly exceed \$1,000. Based on
10 these expenditures, CFG met the statutory threshold for political committee status as of 2000.
11 See 2 U.S.C. § 431(4)(A).

12 2. Club for Growth Exceeded the \$1,000 Statutory Threshold for
13 Contributions By Receiving Funds in Response to Solicitations Clearly
14 Indicating That Contributions Would Be Targeted to the Election or
15 Defeat of a Clearly Identified Candidate For Federal Office

16 CFG also met the statutory threshold for political committee status by receiving
17 contributions exceeding \$1,000 in response to at least five fundraising solicitations clearly
18 indicating that the funds received would be targeted to the election or defeat of specific federal

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In addition, this Office is aware of additional communications, not included in Appendix A, that more clearly constitute express advocacy under § 100.22(b). For example, in 2000, CFG contributed \$20,000 to the American Conservative Union to fund an advertisement against Senate candidate Hillary Clinton that criticized her fitness to represent the State of New York, stating, "In New York, babies like these all have one thing in common. They've lived in New York longer than Hillary Rodham Clinton."

1 candidates.⁵⁸ For example, a solicitation dated September 13, 2000 asserted "Jeff Flake is a Club
2 for Growth endorsed candidate who we helped win the September 12 GOP primary in Arizona's
3 First Congressional District... He will be an extraordinarily effective ally for our issues in
4 Congress if we can help him win the General Election on November 7th" and requested funds to
5 counter the "ugly propaganda by the labor unions."⁵⁹ An earlier fundraising solicitation dated
6 August 28, 2000 used virtually identical language, stating, "Jeff Flake is a Club for Growth
7 candidate this year in Arizona... He will be an extraordinarily effective ally in Congress if we
8 can get him elected (I guarantee he will chop up the class warfare Democrats like Dick Gephardt
9 in little pieces.)"⁶⁰

10 In a March 22, 2004 fundraising solicitation, then-President Stephen Moore requested
11 money to fund CFG's priorities for the 2004 cycle, which included "Counter[ing] the \$15 million
12 that Soros gave left wing groups to criticize President Bush" and "[D]efeate[ing] Tom Daschle in

⁵⁸ Although three of these solicitations were directed to "members" of CFG, CFG fails to qualify as a valid membership organization under the Commission's regulations, which exclude entities primarily organized to influence federal elections. See 11 C.F.R. §§ 100.134(e)(6); Definition of "Member" of a Membership Organization, 64 Fed. Reg. 41266, 41268-69 (Jul. 30, 1999). As discussed above, CFG's activities are overwhelmingly focused on electing fiscally conservative candidates to federal office, and virtually all of CFG's membership solicitations state that CFG's sole or primary purpose is electing pro-growth candidates to Congress. See *supra* note 6 and accompanying text. As a result, CFG is not a valid membership organization.

In addition, CFG's supporters do not qualify as "members" under the Act. The Commission's regulations limit the definition of "members" to persons who have some significant organizational attachment to the membership organization, such as a significant investment or ownership stake; pay membership dues at least annually, of a specific amount predetermined by the organization; or have a significant organizational attachment to the membership organization that includes: affirmation of membership on at least an annual basis and direct participatory rights in the governance of the organization. See 11 C.F.R. § 100.134(f). Because CFG supporters may become "members" simply by providing contact information to the organization and have minimal rights to participate in the organization's governance (only one policy vote in five years), they do not meet the regulatory definition of "members."

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1 South Dakota through the Club's PAC."⁶¹ A solicitation sent to CFG's purported "members"
2 several months earlier, in August 2003, stated the following:

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21 In August 2004, CFG sent a solicitation to large donors that included a videotape
22 containing "attack ads that are being run against President Bush around the country" and CFG's
23 proposed advertisements it planned to run in response. In the videotape, then-President Steve
24 Moore requested "unlimited contributions" to counter advertisements funded by "Hate Bush
25 organizations" and stated,

26 Why am I bringing this to your attention? Because the Club for
27 Growth is fighting back. We intend, with the ads that you'll see at
28 the end of this tape, to defend President Bush's economic record,

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CFG's online "membership" form also previously allowed prospective and current members to earmark their donations for advertising campaigns against Tom Daschle and Howard Dean. See Archived CFG Membership Forms, at http://web.archive.org/web/*/https://www.clubforgrowth.org/join.php (Nov. 21 and Oct 4, 2003) ("Check this box if you would like your contribution to be earmarked for the Daschle ad campaign"); (Dec. 13, 2003) ("Check this box if you want your contributions to be earmarked for the Dean ad campaign").

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10 Based on the language in these solicitations, all funds received in response were "for the purpose
11 of influencing a federal election" and, thus, constitute contributions. *See* 2 U.S.C. § 431(8)(A);
12 *see also* *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995) ("*Survival*
13 *Education Fund*").

14 In *Survival Education Fund*, the court considered whether a fundraising solicitation
15 mailed to the general public by two 501(c)(4) organizations during the 1984 Presidential race
16 resulted in "contributions" under the Act. The cover letter to the solicitation included this
17 language:

18 Funds are urgently needed to help defray the enormous cost of
19 mounting, organizing, publicizing, and coordinating this
20 nationwide effort....

21 Your special election-year contribution will help us communicate
22 your views to the hundreds of thousands of members of the voting
23 public, letting them know why Ronald Reagan and his anti-people
24 policies must be stopped. So, please, return your survey and your
25 check immediately. Anything you can give at this time -- \$50,
26 \$100, \$250, \$500, \$1,000, \$2,500 or more -- will help us reach
27 more people, and increase the effectiveness of our election-year
28 work.

29 *Id.* at 288-89 (capitalization and emphasis in original). The Second Circuit considered whether
30 the solicitation sought "contributions" and was subject to the Act's disclaimer requirements

1 under 2 U.S.C. § 441d(a). Stating that it was unnecessary to consider whether the mailer
2 constituted express advocacy, the court analyzed whether the mailer solicited "contributions"
3 based on *Buckley*'s statement that contributions made to other organizations but earmarked for
4 political purposes were contributions made "for the purpose of influencing elections" and, thus,
5 were properly covered by the Act. *See id.* at 294 (quoting *Buckley*, 424 U.S. at 78). The court
6 interpreted the phrase "earmarked for political purposes," stating,

7 The only contributions "earmarked for political purposes" with
8 which the *Buckley* Court appears to have been concerned are those
9 that will be converted to expenditures subject to regulation under
10 FECA. Thus *Buckley*'s definition of independent expenditures that
11 are properly within the purview of FECA provides a limiting
12 principle for the definition of contributions in § 431(8)(A)(i), as
13 applied to groups acting independently of any candidate or its agent
14 and which are not "political committees" under FECA....
15 Accordingly, disclosure is only required under § 441d(a)(3) for
16 solicitations of contributions that are earmarked for activities or
17 "communications that expressly advocate the election or defeat of a
18 clearly identified candidate for federal office." *Even if a*
19 *communication does not itself constitute express advocacy, it may*
20 *still fall within the reach of § 441d(a) if it contains solicitations*
21 *clearly indicating that the contributions will be targeted to the*
22 *election or defeat of a clearly identified candidate for federal*
23 *office.... Only if the solicitation makes plain that the contributions*
24 *will be used to advocate the defeat or success of a clearly identified*
25 *candidate at the polls are they obliged to disclose that the*
26 *solicitation was authorized by a candidate or his committee.*

27 *Id.* at 295. Based on this reasoning, the court held that the mailer was a solicitation of
28 contributions within the meaning of § 441d, citing the mailer's statement, "Your special election-
29 year contribution will help us communicate your views to the hundreds of thousands of members
30 of the voting public, letting them know why Ronald Reagan and his anti-people policies must be
31 stopped." *Id.* According to the court, this statement "leaves no doubt that the funds contributed

1 would be used to advocate Reagan's defeat at the polls, not simply to criticize his policies during
2 the election year." *Id.*

3 Under *Survival Education Fund*, the language used in CFG's fundraising solicitations
4 clearly indicates that the funds received would be targeted to the election or defeat of specific
5 federal candidates. As a result, all funds received in response to these solicitations constituted
6 contributions triggering the \$1,000 statutory threshold for political committee status.⁶⁴ See 2
7 U.S.C. § 431(8)(A).

8 3. Club for Growth's Major, if Not Sole, Purpose is Federal Campaign
9 Activity

10 To address overbreadth concerns, the Supreme Court has held that only organizations
11 whose major purpose is campaign activity can potentially qualify as political committees under
12 the Act. See, e.g., *Buckley*, 424 U.S. at 79; *FEC v. Massachusetts Citizens for Life*, 479 U.S.
13 238, 262 (1986) ("MCFL"). The major purpose test is a limiting construction on the statutory
14 definition of a "political committee," which means that an organization meeting the statutory
15 threshold for political committee status must also possess the major purpose of campaign
16 activity. See *MCFL*, 479 U.S. at 262; *FEC v. Malenick*, 310 F.Supp. 2d 230, at 234-36 (D.D.C.
17 2004), *rev'd in part on other grounds* 2005 WL 588222 (D.D.C. Mar 07, 2005) ("*Triad*").

18 CFG's activities and public statements demonstrate that CFG's major, if not sole, purpose
19 is to elect pro-growth conservative candidates to Congress. See *FEC v. GOPAC*, 917 F. Supp.
20 851, 859 (D.D.C. 1996) (stating that the major purpose of an organization may be shown by
21 public statements of its purpose or by other means, such as its expenditures in cash or in kind to

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Based
on CFG's total receipts and on the amount of funds spent by CFG on relevant advertisements and public

1 or for the benefit of a particular candidate or candidates) (citing *MCFL*, 479 U.S. at 262). For
2 example, CFG's website states,

3 *There's a lot at stake in the 2004 elections: Control of the White*
4 *House, Senate and House of Representatives is all up for grabs.*
5 *The House and Senate Republican majority-slim as it is-must be*
6 *defended. We can't afford to lose that controlling stake the GOP*
7 *now enjoys in Washington. We can't let Democrats like Minority*
8 *Leaders Nancy Pelosi and Tom Daschle take the gavel, and control*
9 *the flow of all legislation in the Congress. In fact, it's up to us to*
10 *strengthen and expand the Republican majority by electing more*
11 *free market, pro-growth conservatives. As a means to taking*
12 *control of Congress with pro-economic growth conservatives, the*
13 *Club for Growth is seeking to double, even triple, our membership*
14 *over the coming months. After all, our strength is in numbers. The*
15 *larger our membership, the more muscle and money we'll have to*
16 *get pro-growth candidates elected... And, the more strength we'll*
17 *have to hold Republicans' feet to the fire, so they'll have the*
18 *courage to make good on their promises. Since we target the most*
19 *competitive races, your membership in the Club will help*
20 *Republicans keep control of the Congress. What's more, it will*
21 *help Republicans keep control by electing leaders committed to the*
22 *pro-growth, limited government beliefs you share. Not by electing*
23 *Republicans who vote like Democrats. And, as a member of the*
24 *Club for Growth, you will be part of an organization whose goal is*
25 *to defeat status quo incumbents.*⁶⁵

26 Similarly, solicitations sent to prospective donors state, "The Club for Growth is a membership
27 organization with a sole mission – to support political candidates who are advocates of the
28 Reagan vision of limited government and lower taxes."⁶⁶ CFG's activities, including its
29 candidate research and advertising campaigns discussed above,⁶⁷ confirm that the major purpose
30 of the organization is to elect federal candidates.

communications, *see supra* pp. 8-13, it is clear that the funds received in response to each of the identified solicitations greatly exceeded \$1,000.

⁶⁵ What's At Stake in the 2004 Election?, at <http://www.clubforgrowth.org/whats.php> (last visited Apr. 8, 2005) (emphasis in original); *see also supra* note 6.

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1 CFG's political activities and statements are virtually identical to those cited by the court
2 as evidence of "major purpose" in *Triad*. In that case, the court found that Triad Management
3 Services, Inc. and its predecessors ("Triad") violated the Act by, *inter alia*, failing to register as a
4 political committee. *See* 310 F.Supp. 2d at 234-36. Although Triad represented itself as a for-
5 profit marketing company established to advise potential political contributors, it explicitly stated
6 that its purpose was "retaining GOP control of Congress and the advance of a conservative issue
7 agenda." *See id.* at 235. Indeed, Triad conducted political audits of approximately 250
8 Republican candidates during the 1996 election cycle. These audits involved multiple contacts
9 between Triad and the candidates and allowed Triad to obtain detailed information about the
10 candidates' prospects in the upcoming election, provide advice to candidates about campaign
11 strategy, and ascertain which candidates to support. Based on the results of the audits, Triad
12 provided fundraising assistance to selected campaigns, expressly advocated support of the
13 candidates to its donor network, and published a voter guide providing detailed information
14 about recommended House and Senate candidates. *See id.*

15 The court held that Triad's major purpose was to elect conservative candidates to federal
16 office based on Triad's public statements and extensive political activities. In particular, as
17 evidence of its major purpose, the court cited Triad's goals for the 1996 election cycle: (1)
18 Return Republican House Freshmen; (2) Increase by 30 the Republican House Majority; and (3)
19 Increase Senate Republicans to a Filibuster-proof 60. *See id.* As noted by the court, Triad's
20 primary objective was "to get major donors involved so that the ideally conservative candidates
21 could be elected, and if those types of candidates with those types of views got into Congress
22 there wouldn't necessarily be a need for heavy lobbying." *Id.*

1 Like Triad, CFG's extensive electoral activities and public statements demonstrate its
2 major purpose is electing federal candidates. As discussed above, CFG conducts extensive
3 candidate research, raises and spends money on advertising campaigns that support federal
4 candidates or attack their opponents, and conducts polls aimed at ascertaining the vulnerability of
5 moderate House and Senate incumbents. These activities comprise virtually all of CFG's
6 disbursements.⁶⁸ In addition, CFG identified the following goals for the 2004 cycle, which are
7 strikingly similar to those articulated by Triad:

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⁶⁸ See *supra* pp. 7-13.

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1 These statements, along with CFG's extensive political activities intended to elect fiscally
2 conservative candidates to Congress, demonstrate that CFG is overwhelmingly focused on
3 influencing the nomination and election of federal candidates.

4 4. As a Result, Club for Growth Triggered Political Committee Status as of
5 2000 and Had a Continuing Duty to Report to the Commission and
6 Comply with the Contribution Limits and Source Limitations of the Act

7 Based upon the foregoing, CFG exceeded the \$1,000 threshold for political committee
8 status set forth in 2 U.S.C. § 431(4)(A) by making approximately \$1.28 million in expenditures
9 and by receiving contributions in response to fundraising solicitations clearly indicating that the
10 funds received would be targeted to the election or defeat of specific federal candidates. Since
11 2000, CFG has had a continuing duty to report to the Commission and comply with the
12 contribution limits and source limitations of the Act. Because it has not, the General Counsel is
13 prepared to recommend that the Commission find probable cause to believe that CFG violated 2
14 U.S.C. §§ 433 and 434 by failing to register and report as a political committee.

15 As a political committee, CFG must comply with the Act's contribution limits and source
16 restrictions. Because CFG accepted – indeed, actively sought – both unlimited individual
17 contributions and corporate contributions, CFG violated the Act. Accordingly, the General
18 Counsel is prepared to recommend that the Commission find probable cause to believe that CFG
19 violated 2 U.S.C. § 441a(f) by knowingly accepting contributions in excess of \$5,000 and 2
20 U.S.C. § 441b(a) by knowingly accepting corporate contributions. In addition, because CFG and
21 CFG PAC are affiliated and share a single contribution limit, the General Counsel is prepared to
22 recommend that the Commission find probable cause to believe that CFG PAC and Pat Toomey,
23 in his official capacity as treasurer, violated 2 U.S.C. § 441a(f) by knowingly accepting

1 contributions in excess of \$5,000 and 2 U.S.C. § 441b(a) by knowingly accepting corporate
2 contributions.⁷⁰

3 **B. In the Alternative, Club for Growth Either Failed to Allocate Expenses**
4 **between Federal and Non-Federal Accounts or Made Prohibited Corporate**
5 **Expenditures**

6 As an alternative to finding that CFG is a political committee subject to contribution
7 limits and source prohibitions, as well as independent reporting obligations, the General Counsel
8 is prepared to recommend that CFG's activities result in two alternative violations of the Act.
9 First, CFG and CFG PAC operated as a single political committee conducting federal and non-
10 federal activity and violated the Act by failing to comply with the Commission's allocation
11 regulations and by using non-federal funds to pay the federal share of their expenses. See 11
12 C.F.R. §§ 102.5(a), 104.10(b)(4), 106.6. Second, CFG operated as a corporation with a
13 connected SSF and violated the Act by making prohibited corporate expenditures. See 2 U.S.C.
14 § 441b; 11 C.F.R. § 114.2(a).

15 1. Club for Growth Failed to Allocate and Report Shared Administrative and
16 Fundraising Activities and Used Prohibited Funds to Pay for the Federal
17 Share of Those Expenses, Resulting in Prohibited and Excessive
18 Contributions

19 As an alternative to finding that CFG is a political committee subject to contribution
20 limits and source prohibitions, as well as independent reporting obligations, the General Counsel
21 is prepared to recommend that the Commission find probable cause to believe that Respondents
22 have been operating CFG and CFG PAC as a single political committee conducting federal and

⁷⁰ CFG established CFG PAC as its SSF. See CFG PAC, Statement of Organization (Jul. 1, 1999). Disclosure reports filed by CFG and CFG PAC list the same individuals as directors and officers and describe the relationship between CFG and CFG PAC as "connected." See CFG PAC, Statement of Organization (amended Jan. 21, 2005); CFG, Form 8871: Political Organization Notice of 527 Status at (amended Jan. 31, 2005). In addition, CFG and CFG PAC share staff and have only one permanent employee who works exclusively for CFG, and CFG solicits money for CFG PAC. CFG and CFG PAC thus

1 non-federal activity. As a result, CFG and CFG PAC violated the Act by failing to allocate
2 federal and shared expenses pursuant to the Commission's allocation regulations. *See* 11 C.F.R.
3 §§ 102.5(a), 104.10(b)(4), 106.6.

4 Under the Commission's allocation regulations, a political committee that conducts both
5 federal and non-federal activities may set up a single federal account subject to the requirements
6 of the Act or establish separate federal and non-federal accounts. *See* 11 C.F.R. § 102.5(a).

7 When a political committee uses separate federal and non-federal accounts, it must allocate
8 shared expenses between the accounts either by paying the entire amount of the expenses from its
9 federal account and transferring funds from its non-federal account to cover the non-federal share
10 of the expenses, or by establishing a separate allocation account into which funds from its federal
11 and non-federal accounts shall be deposited solely for the purpose of paying shared expenses.

12 *See* 11 C.F.R. § 106.6(a), (b), (e). A political committee that pays allocable expenses in
13 accordance with these procedures is required to report each disbursement from its federal account
14 or its separate allocation account as a payment for a joint federal and non-federal expense. *See*
15 11 C.F.R. § 104.10(b)(4). In addition, a political committee using federal and non-federal
16 accounts must use its federal account to pay all disbursements, contributions, expenditures and
17 transfers by the committee made in connection with any federal election, and may not transfer
18 funds from its non-federal account into its federal account, except as provided in 11 C.F.R. §
19 106.6(e). *See* 11 C.F.R. § 102.5(a)(1).

20 Under its current structure, CFG pays the fundraising and administrative costs for CFG
21 PAC, including disbursements for office supplies, document duplication, telephone fees, rent and

are established, financed, maintained, and controlled by the same person or group of persons. *See* 11 C.F.R. §§
100.5(g)(2) and 110.3(a)(1).

clerical support.⁷¹ While a connected organization may pay all of the establishment, —
administration and solicitation costs of its SSF from treasury funds, a political committee with
federal and non-federal accounts must allocate fundraising and administrative costs. *Compare 2*
U.S.C. § 441b(b)(2) *with* 11 C.F.R. § 106.6. If CFG and CFG PAC are the federal and non-
federal accounts of a single political committee, rather than a connected organization with an
SSF, this failure to allocate administrative expenses violates 11 C.F.R. § 106.6.

Moreover, and as described *supra*, CFG made expenditures for communications
containing express advocacy of federal candidates.⁷² CFG also funded numerous
communications that promote, support, attack or oppose ("PASO") clearly identified federal
candidates, including fundraising solicitations containing PASO.⁷³ All such expenditures should
have been paid in full by the federal account, CFG PAC, rather than by CFG. *See* 11 C.F.R. §
102.5; *see also* Advisory Op. 2003-37 at 2-4, 9-11 ("ABC AO") (*citing McConnell v. FEC*, 124
S.Ct. 619 (2003)).⁷⁴ In addition, because funds received in response to CFG's fundraising
solicitations that convey plans to use funds to support or oppose to specific federal candidates
were contributions subject to the source limitations and contribution limits of the Act, CFG was

⁷¹ *See supra* notes 42-52 and accompanying text *see also* CFG, Form 8872: Report of Contributions and Expenditures, Schedule B (Apr. 20, 2004), at 14-21; (Feb. 20, 2004), at 14-19; (Aug. 12, 2003), at 9-17; (Jun. 6, 2002), at 9-13.

⁷² *See supra* at Section III.A.1; *see also* Appendix A.

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⁷⁴ Effective January 1, 2005, the Commission established new allocation regulations, thereby expressly superseding the ABC AO from that date forward. *See* 11 C.F.R. §§ 100.57, 102.5, 104.10, 106.6 (2005); *see also* Explanation and Justification, 69 Fed. Reg. 68,056 (Nov. 23, 2004). The investigation in this matter does not include 2005 activity.

1 required to deposit them into its federal account.⁷⁵ *See ABC AO at 19-20; see also Survival*
2 *Education Fund; supra.*

3 As a result, Respondents violated 2 U.S.C. §§ 441a(f), 441b and 11 C.F.R. §§ 102.5,
4 104.10, and 106.6 by failing to allocate and report shared administrative expenses between
5 federal and non-federal accounts and by financing entirely federal expenses from a non-federal
6 account, which resulted in the use of prohibited and excessive contributions in federal elections,
7 and by failing to treat as contributions funds received for the purpose of influencing a federal
8 election.

9 2. Club for Growth Made Prohibited Corporate Expenditures

10 In the alternative, the General Counsel is prepared to recommend that the Commission
11 find probable cause to believe that CFG is a corporation with a connected SSF, rather than one or
12 more political committees, and has made expenditures in violation of the Act.⁷⁶ The Act
13 prohibits corporations from making contributions or expenditures from their general treasury
14 funds in connection with a federal election. *See* 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(a). As
15 discussed above, CFG funded communications expressly advocating the election or defeat of
16 clearly identified federal candidates.⁷⁷ CFG's expenditures for express advocacy in its GOTV
17 communications and broadcast advertisements constitute corporate expenditures prohibited by
18 the Act. As a result, CFG violated 2 U.S.C. § 441b and 11 C.F.R. § 114.2(a).

⁷⁵ *See* Section III.A.2.

⁷⁶ CFG is ineligible for *MCFL* status because it accepted corporate contributions totaling at least \$10,000 in 2000, \$45,000 in 2001-02, and \$30,000 in 2003-04, amounts that are not *de minimus*. *See FEC v. National Rifle Ass'n*, 254 F.3d 173, 192 (D.C. Cir. 2001) (holding that the NRA qualified for *MCFL* status in 1980 because the organization received only \$1,000 in corporate contributions but was not eligible in 1978 and 1982, when it received \$7,000 and \$39,786, respectively).

⁷⁷ *See supra* pp. 16-18 and Appendix A.

IV. GENERAL COUNSEL'S RECOMMENDATIONS

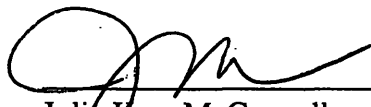
1. Find probable cause to believe that Club for Growth, Inc. violated 2 U.S.C. §§ 433 and 434 by failing to register as a political committee with the Commission and report its contributions and expenditures.
2. Find probable cause to believe that Club for Growth, Inc., Club for Growth, Inc. PAC and Pat Toomey, in his official capacity as Treasurer, violated 2 U.S.C. § 441a(f) by knowingly accepting contributions in excess of \$5,000 and 2 U.S.C. § 441b(a) by knowingly accepting corporate contributions.
3. In the alternative, find probable cause to believe that Club for Growth, Inc., Club for Growth, Inc. PAC and Pat Toomey, in his official capacity as Treasurer, violated 2 U.S.C. §§ 441a(f), 441b and 11 C.F.R. §§ 102.5, 104.10, and 106.6 by failing to allocate and report shared administrative and fundraising activities, which resulted in prohibited and excessive contributions, and by failing to treat as contributions funds received for the purpose of influencing a federal election.
4. In the alternative, find probable cause to believe that Club for Growth, Inc. violated 2 U.S.C. § 441b and 11 C.F.R. § 114.2(a) by making prohibited corporate expenditures.

4/25/05
Date


Lawrence H. Norton
General Counsel


Rhonda J. Vosdigh
Associate General Counsel for Enforcement


Ann Marie Terzaken
Assistant General Counsel


Julie Kara McConnell
Attorney

Attachment
Appendix A

Advertisement	Election and Date	Text
"Keller and Sublette,"	2000 Republican Primary in FL-8 Primary held 09/12/00, with runoff primary on 10/03/00;	I hear about how well the economy is doing but my husband and I are working harder than ever. Taxes are a big issue for us. That's why I was so upset when I read that Bill Sublette was the only Republican to vote to allow higher property taxes. Fortunately Ric Keller is a fighter for lower taxes and a simpler tax system. In the election for Congress there is a clear choice: higher taxes with Bill Sublette or lower taxes with Ric Keller.
"Mission" Radio (:60),	2000 Republican Runoff Primary in FL-8 Runoff primary held on 10/03/00;	This is a mission for Orange County Republican primary runoff voters. Your mission is to find a Republican for Congress who will battle liberal Democrat Linda Chapin. It's a dangerous mission. Left-wing special interest groups are pouring money into Chapin's campaign. Should you choose to accept this mission, you must find a Reagan Republican like Ric Keller. Ric Keller is the true fiscal conservative in the Republican run-off election. Only Ric Keller offers a sharp contrast with liberal Linda Chapin on the issues. On taxes, Chapin pushed for an increase in the sales tax. Keller is committed to lower taxes. On spending, Chapin dumped our tax dollars on wasteful projects like a bronze frog. Keller is a champion fighter for smaller government and less wasteful spending. This tape will self-destruct in 10 seconds. Remember, only a tax cutter like Ric Keller can help you accomplish your mission. Good luck.
"Mission" TV (:30),	2000 Republican Runoff Primary in FL-8 Runoff primary held on 10/03/00;	This is a mission for Orange County Republican runoff voters. You must find a conservative Republican for Congress who will battle liberal Democrat Linda Chapin. Ric Keller is the true fiscal conservative in the runoff. Only Ric Keller offers a sharp contrast with Chapin on taxes and spending. Keller is a champion fighter for lower taxes and less wasteful spending. This tape will self-destruct in 10 seconds. Remember, only a tax cutter like Ric Keller can compete with liberal Linda Chapin.
"Taxes" TV (:30),	2001 Republican Special Primary in AR-03 Primary held on 09/25/01, with Runoff Primary on 10/16/01	For Congress, Conservative Gunner Delay or Moderate John Boozman? Gunner Delay voted to cut taxes in four straight sessions of the Arkansas General Assembly. He's pledged to oppose all tax increases in Congress. Moderate John Boozman has no record of fighting taxes. He refuses to rule out tax increases. When a politician won't rule out taxes, you can be sure he'll raise 'em. In the race for Congress, Gunner Delay is the real conservative.

Advertisement	Election and Date	Text
"Flake Commercial,"	2000 Republican Primary in AZ-01 Primary held 09/12/00	<p>"Hey the Republican primary for Congress is coming up, what do you know about the candidates?"</p> <p>"Well I know Jeff Flake is a solid fiscal conservative and he is a big backer of real education reforms, too."</p> <p>"Yeah, I've heard great things about Jeff Flake."</p> <p>"Yeah, I've heard Matt Salmon's even endorsed him."</p> <p>"That's right. Congressman Salmon and Jeff Flake are pretty much cut from the same cloth. Salmon and Flake are both fighters for lower taxes, less government and more Freedom."</p> <p>"It's not only that though, what's great about Salmon is that he has the courage and independence to stand up for what's right even when the other politicians are against it."</p> <p>Well Jeff Flake is the same way. Look at the Cardinal Stadium issue. The insiders and the politicians want to raise our taxes just to pay for a new stadium we don't even need."</p> <p>"Jeff Flake says, 'NO WAY' to that kind of corporate welfare."</p> <p>"That's the kind of leadership we could use more of in Washington. Jeff Flake is a real leader in the Arizona tradition."</p>
Gunner Delay Polls,	2001 Republican Special Runoff Primary in AR-03 Runoff primary held on 10/16/2001	<p>Conservative Gunner Delay voted to cut taxes in four straight sessions of the Arkansas General Assembly. He's pledged to oppose all tax increases in Congress. Moderate John Boozman refuses to rule out tax increases. When a politician refuses to rule out taxes, you can be sure he'll raise 'em. Based on this information, will you be voting for Gunner Delay or John Boozman in Tuesday's Congressional election?</p> <p>Conservative Gunner Delay voted to cut taxes in four straight sessions of the Arkansas General Assembly. He voted to cut the income tax, cut the property tax and cut the sales tax. He is the only candidate who will oppose all tax increases. If you strongly support Gunner Delay's record, please say yes now.</p>
Jeff Flake GOTV Phone Calls	2000 Republican primary in AZ-01 Primary held on 09/12/00	<p>Hello, this is former Congressman and Former Secretary of Housing Jack Kemp. Like Matt Salmon, Jeff Flake is dedicated to the Republican and Reagan ideas that you and I care about, like cutting tax rates, expanding economic growth and opportunity, limiting the size of government and restoring respect for American here and around the world. One of the reasons that I am so enthusiastic about Jeff Flake is that in the four years</p>

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		<p>that he served as the President of Arizona's Goldwater Institute, Jeff promoted free market policies that helped grow the Arizona economy. When George W. Bush is elected President, he'll need people like Jeff Flake. Jeff will serve your first district, I believe in Arizona, with honesty, integrity and dedication. Please vote on Tuesday and keep Jeff Flake in mind when you do. Thank you.</p> <p>Hi, this is US Senator Orrin Hatch.</p> <p>There is a Republican primary election Tuesday to choose the candidate best suited to carry on Matt Salmon's fine work in Congress. I know Jeff Flake, and he is a great candidate. Jeff Flake will fight for lower taxes. He has the courage to stand up to the special interests in Washington -- so you can keep more of your hard earned money. Jeff Flake is a Reagan Republican who would make a fine addition to Arizona's congressional delegation. I know Matt Salmon agrees with me. Thank you for listening to this message, and please remember that there is an election tomorrow.</p>	
Ric Keller GOTV Phone Calls	2000 Republican primary in AZ-01 Primary held on 09/12/00	<p>Hi, this is "Dusty" Rhodes, president of the nation's leading conservative magazine, National Review, calling with important information about Tuesday's Republican congressional primary. This election is about which candidate is best suited to carry on Bill McCollum's legacy of conservative values in the U.S. Congress. I am disturbed that the Trial Lawyers are spending hundreds of thousands of dollars on behalf of Bill Sublette to try and buy this election. I'm sure you've seen the ads from these lawyers that mostly support liberal Democrats. You have a choice tomorrow. Ric Keller will fight for lower taxes. Rick is a conservative and wants you to keep more of your hard earned money. He also supports a flatter simpler IRS tax code. Ric Keller is pro-Second Amendment and endorsed by National Right to Life. And Ric Keller is not a career politician and is the only candidate to sign the term limits pledge. Tomorrow remember that the real Reagan Republican is Ric Keller.</p> <p>Hi, this is bob/jane calling with important information about Tuesday's Republican Congressional primary. While in the legislature, Bill Sublette voted for higher property taxes. You have a choice. Ric Keller will fight for lower taxes. Ric is a conservative and wants you to keep more of your hard earned money. He also supports a simple and fair income tax. On</p>	\$39,631.04

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		<p>Tuesday, September 5th, remember that the real Reagan Republican is Ric Keller and he believes its your money, not the government's. Thank you and good evening. This message was paid for by The Republican Club for Growth.</p> <p>GOTV phone bank asks, "Have you had a chance to vote?" and then says, after a "no" response, "It's getting late and your vote is critical. Ric Keller is a conservative who will unite Republicans and run the strongest race against liberal Democrat Linda Chapin. Polls are only open till 7 p.m. Please be sure to vote! Thank you!"</p> <p>Hi, this is Congressman Dave Weldon from Florida's 15th congressional district, located on the Space Coast. There is a Republican primary election Tuesday to choose the candidate best suited to carry on Bill McCollum's conservative values in Congress. I know Ric Keller, and he is a great candidate. Ric Keller will fight for lower taxes. He has the courage to stand up to the special interests in Washington -- so you can keep more of your hard earned money. Ric Keller is a true Reagan Republican who would make a great conservative congressman in Washington fighting alongside me for our values. Please, remember to vote in Tuesday's primary. Thank you for listening to this message, paid for by the Republican Club For Growth.</p>	
"Courage" (TV) ¹	2002 Republican primary in IA-5	<p>FARMER: Congress could sure use a real Iowa conservative.</p> <p>(On screen: Plain talk about an Iowa conservative)</p> <p>When it comes to our principles, nobody fights harder than state Senator Steve King. In the General Assembly, Steve King led the fight to eliminate the inheritance tax and cut income taxes. He helped lower our property taxes, too. I wish more congressmen were like Steve King -- someone with the courage to do what's right. You know, politicians talk a lot about fighting for taxpayers. Steve King is the real deal.</p> <p>(On screen: Paid for by Club for Growth)</p>	\$140,000.00

¹ See "Courage" Script, at <http://www.clubforgrowth.org/video/king-script.php> (last visited Apr. 8, 2005); see also Ryan Connors, *Conservative Group Praises King on Taxes*, at <http://nationaljournal.com/members/adspotlight/2002/05/0522cfg1.htm> (May 22, 2002).

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"Garrett" (TV) ²	2002 Republican Primary in NJ-5	<p>(On screen: In the Republican primary for Congress, Who's the Real Tax-Cutter?)</p> <p>ANNOUNCER [v/o]: Welcome to "Who's the Real Tax Cutter?"</p> <p>Is it David Russo? Russo's voted for tax increases, and he's backed by liberal groups like the Sierra Club.</p> <p>(On screen: A red X appears over a picture of Russo as a buzzer sounds)</p> <p>Is it Gerry Cardinale? Cardinale's a 23-year Trenton insider who voted to raise taxes 23 times.</p> <p>(On screen: A red X appears over a picture of Cardinale as a buzzer sounds)</p> <p>Is it Scott Garrett? Garrett has voted to cut our taxes dozens of times. And Scott Garrett has never voted for higher taxes.</p> <p>(On screen: Lights flash around a picture of Garrett)</p> <p>Thanks for playing "Who's the Real Tax-Cutter?"</p> <p>(On screen: Paid for by the Club for Growth)</p>	\$100,000.00
"Daschle Democrats" ³	2002 Senate races in Texas, Arkansas, South Dakota, New Hampshire, Colorado and Missouri	<p>This is Senate Democratic leader Tom Daschle. Tom Daschle and the Daschle Democrats like to say no.</p> <p>(On screen: Bobblehead dolls of Tom Daschle, Ted Kennedy, and Hillary Clinton)</p> <p>No to President Bush on job-creating tax cuts.</p> <p>(On screen, "No on Tax Cuts")</p> <p>No to President Bush on homeland security.</p> <p>(On screen, "No on Homeland Security")</p> <p>No to President Bush on eliminating the unfair death tax.</p>	\$600,000

² See "Garrett" Script, at <http://nationaljournal.com/members/adspotlight/2002/05/0531cfig1.htm>; *Fight for the Fifth*, N.J. RECORD, Aug. 5, 2002, at A1.

³ See Club for Growth Press Release, <http://www.clubforgrowth.com/advertising/daschle-2-press.php> (Oct. 23, 2002); "Daschle Democrats" Advertisement, available at <http://www.clubforgrowth.org/pastproject.php> (last visited Apr. 11, 2005); BCRA And Interest Group Advertising In The 2002 Elections, at <http://www.polisci.wisc.edu/tvadvertising> (last visited Apr. 4, 2005) (includes storyboard for advertisement aired in Arkansas)

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		(On screen, "No on Eliminating Death Tax") But the Daschle Democrats say yes to Ron Kirk for U.S. Senate, and that's bad for Texas. (On screen, "Ron Kirk... Bad for Texas") Call Ron Kirk. Tell him to say no to the Daschle Democrats (On screen, "Call 214-841-1001. Say NO to the Daschle Democrats")	

* Unless designated otherwise, cost information for these advertisements is from taken from *McConnell v. FEC*